Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ~~78-245~~

LEHIGH LUMBER COMPANY, INC.,
Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

LEHIGH LUMBER COMPANY, INC.,

Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lehigh Lumber Company, Inc., your Petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 16, 1978.

OPINIONS BELOW

The Judgement Order of the United States Third Circuit Court of Appeals made without benefit of opinion is printed in the Appendix hereto, infra page 1 . The Decision and Order of the National Labor Relations Board appealed from is printed in the Appendix hereto, infra page 2.

JURISDICTION

The judgement of the United States Court of Appeals for the Third Circuit was entered on May 16, 1978. A timely Motion for a Trial De Novo and Stay of Enforcement Order was denied on June 12, 1978.(Appendix, infra,page 4)
The jurisdiction of the Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

Whether the General Counsel of the Board met its burden of proof of any majority status of a union by offering and relying thereupon a labor contract, unlawful on its face, void ab initio and in its entirety without any saving or separability clause contained therein in a proceeding which became the basis for a Board order to bargain with a minority union where a prior valid representation question was raised by both the employees and the employer.

STATUE INVOLVED

The National Labor Relations Act, as amended 61 Stat. 136. 29 U.S.C.A. Sections: 157
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing (emphasis added), and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain (emphasis added) from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

158 (a) (3)
by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning

of such employment or the effective date of such agreement, whichever is the later, (i) if any such labor organization is the representative of the employees as provided in section 9(a), (emphasis added) in the appropriate collective-bargaining unit covered by such agreement when made...

158 (b) (1) (A)
It shall be an unfair labor practice for a labor organization or its agents(1)to restrain or coerce(A)employees in the exercise of the rights guaranteed in section 7:(emphasis added). . . .

159 (a)
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees(emphasis added) in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit...

STATEMENT OF CASE

Your Petitioner was charged by a union[1] with unfair labor practices on August 9, 1976, after the union learned that your Petitioner's employees had filed a petition for a certification election.[2] The

1. Teamsters Local No. 773
2. Although your petitioner voluntarily recognized the union as a minority union and bargained with them as a member of an employer's association until the association dissolved on August 1, 1976, the union was not ever certified to represent your Petitioner's employees at any time.

Charge blocked the election per Board[3] policy. Your Petitioner also petitioned for an election during November 1976. To date no election has been held to determine the majority status of the union.

From Complaint issued on November 19, 1976, and hearing held on January 20,1977, your Petitioner appealed to the Board on May 17, 1977. The Board issued its Decision and Order on July 25, 1977.

Pursuant to Section 10 (f) of the National Labor Relations Act, as amended, hereinafter the Act, your Petitioner filed a Petition for Review of the Board's final order with the United States Court of Appeals for the Third Circuit on August 18, 1977. Upon denial of review by that Court on May 16, 1978, and enforcement of the Board's order on June 7, 1978, your Petitioner filed a timely Motion for a Trial De Novo and Stay of Enforcement Order which was denied on June 12, 1978.

Thereafter your Petitioner requested a Stay Pending Review on Certiorari from Mr. Justice William J. Brennan, Jr. Said request was denied on July 21, 1978, and the instant Petition for a Writ of Certiorari was filed.

REASONS FOR GRANTING WRIT

Your Petitioner was ordered by the Board to bargain with a minority union against the wishes of all of its employees not-

3. The National Labor Relations Board.

withstanding the mandate of Section 9(a) of the Act which requires majority status as a prerequisite to any demand by a union to represent or bargain for your Petitioner's employees.

Contrary to the Act, the General Counsel of the Board erroneously relied in toto upon a pre-existing void labor contract to prove that the union possessed the requisite majority status concerning your Petitioner's employees.

Said contract was void ab initio because it contained an unlawful union security clause[4] which required union membership prior to the statutory 30 day period and because it purported to apply prior to the effective date of the contract. In both of the above instances the Board uniformly finds the entire contract void ab initio, Paragon Products Corp., 134 NLRB 662 (1961)

As the moving party said burden of proof was upon General Counsel to establish on the record the majority status of any union demanding to bargain or entitled to bargain with your Petitioner, Fort Smith Outerwear, Inc., v NLRB (CA8, 1974) 499 F2d 223; Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973).

The only fact established on the record by General Counsel was that the labor contract violated Section 8(A) (3) of the Act and that said contract and unlawful union security clause acted as an unlawful restraint upon your Petitioner's employees' free choice of a bargaining representative

4. Article 4 Union Membership, Para. 2, Appendix page 4.

contrary to Section 7 of the Act, Santa Fe Trail Transportation Co., 139 NLRB 1513(1962); Standard Molding Corp., 137 NLRB 1515 (1962).

The labor contract contained an important and indispensible void union security clause which permeated the entire contract and indeed provided the very basis for the union to demand to bargain in the first instance. This void union security clause was the very clause relied upon by the General Counsel to attempt to establish majority status of the union. The instant issue concerning the existence of any bargaining status of the union to enable it to represent your Petitioner's employees is directly and inextricably involved with said clause and its effect upon the whole contract. Moreover, the void contract did not contain any severance or any separability clause, NLRB v Rockaway News Supply Company, Inc., 73 S.Ct.519, 345U.S. 71, 97L. Ed. 832 (1953). Thus the purpose for which the unlawful labor contract was introduced by General Counsel must fail for lack of proof of any majority status of any union.

It is essential that your Petitioner and its employees are entitled to the same treatment under the Act that the Board affords to an outside union in "contract bar" situations wherein the Board will order an election upon petition of an outside union whenever the Board determines that a pre-existing labor contract contains an unlawful union security

clause which voids the entire agreement. Paragon case, Standard Molding case, supra. The patent effect thereof is to deny an incumbent union any majority status until proved by a duly held certification election provided for under Section 9 of the Act.

The Act under Section 9 (a) mandates majority status as a prerequisite to any bargaining obligation. The Board failed to establish any union majority status by its proof and in juxtaposition to requests by both your Petitioner and its employees[5] for a Board certification election.

It is therefor urgently important to not only your Petitioner but to all other employers in like circumstances whose employees reject a union that the Board orders their employer to bargain with based upon the erroneous proof offered by the General Counsel of the Board of the majority status of said union founded upon a void labor contract which contains on its face an unlawful union security clause but does not contain any saving or separability clause.

Much confusion has resulted concerning the effect of invalid union security clauses upon the majority status of the incumbent union because of the Board declaring the whole labor contract void ab initio in some instances and refusing to do so in other instances including the instant case. Compare NLRB v Martin Bldg. Material Company,(CA5,1970)431 F2d1246:

5. Employees as used in this Petition represent permanent replacements who are being repeatedly harassed by the union, a condition which has lasted for more than two years without relief.

Mc Leod v United Brotherhood of Industrial Workers (CA2,1961) 288F2d 198; Paragon case; Standard Molding Case, supra, with Rockaway News Case supra; Re Port Pub. Co.,57 S.E.2nd 366, 231 N.C.395, 14 ALR 2nd 842 (1950); Pine Transport, Inc., 197 NLRB 43(1972).

Clearly, justice and fairness and certainty of the law require that the Board equally apply the statute to all parties concerned. If the Board interprets a labor contract as void ab initio and in its entirety as to one party eg. an outside labor union, then the law requires that it apply the same interpretation to all other parties eg. employers and employees including your Petitioner. It must be decided by this honorable Court what uniform effect under the Act is to be applied by the courts and the Board to a labor contract unlawful on its face because it contains a clearly unlawful union security clause without any saving or separability clause therein.

None of these employees were involved in the charge filed by the union and are without any knowledge of it.

CONCLUSION

WHEREFORE, your Petitioner, Lehigh Lumber Company prays that for the reasons outlined above, this petition for a writ of certiorari will be granted.

Respectfully submitted,

August 11, 1978 — Louis Martin Busch

DATE

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2076

LEHIGH LUMBER COMPANY, INC.
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
Entered July 25, 1977

Argued May 4, 1978

Before: ADAMS, VAN DUSEN and ROSENN, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by Petitioner, it is

ADJUDGED and ORDERED that the application for review is denied; and enforcement of the National Labor Relations Board is hereby granted.

Certified as a true copy and issued in lieu of a formal mandate on June 7, 1978.
Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit
BY THE COURT,

Adams
Circuit Judge

ATTEST:

Copy

Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: May 16, 1978

230 NLRB No. 164

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEHIGH LUMBER COMPANY
and
BROWN-BORHEK COMPANY
and
LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case 4-CA-8147

DECISION AND ORDER

On April 26, 1977, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, the Respondent Lehigh Lumber Company filed exceptions and a supporting brief; the General Counsel filed a brief in answer to Respondent's exceptions and brief, cross-exceptions and a supporting brief; Respondent filed a brief in answer to the General Counsel's cross-exceptions

and briefs; and the Charging Party filed its brief previously submitted to the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, The National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Lehigh Lumber Company, Allentown, Pennsylvania, and Brown-Borhek Company, Bethlehem, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 25, 1977

Howard Jenkins, Jr., Member

(SEAL)

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2076 May 23, 1978

LEHIGH LUMBER COMPANY, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

Present: Adams, Van Dusen and Rosenn,
Circuit Judges.

1. Motion by petitioner to stay the enforcement of the Board's order and order a trial DE NOVO,

in the above-entitled case. The judgment order was entered on May 16, 1978.

The foregoing Motion is/are denied.

By the Court,

Dated: June 2, 1978 ADAMS

Judge

ARTICLE 4. **UNION** MEMBERSHIP

2. Any person hired by an Employer for work in any of the job classifications included in this Agreement, prior to or subsequent to the effective date of this Agreement, shall be hired as a temporary employee, and in the event that

such person is continued in employment seven (7) days after the date of his employment, he shall be required as a condition of continued employment, to become and remain a member in good standing in the Union.